United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 8, 2006

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Mainline Masonry
Case 4-CA-33391

This Section 8(a)(1) case was submitted for advice on whether a criminal complaint filed by the Employer's representative, charging a Union representative with harassment and disorderly conduct during a Union demonstration was unlawful under BE & K.[1]

We conclude, in agreement with the Region, that there is insufficient evidence that the charges in the criminal complaint were baseless or filed solely with a motive to impose the costs of litigation.

FACTS

The Employer, a masonry contractor, is owned and managed by President John McAveney. The owner's son, Kevin, is his administrative assistant and has also acted as an Employer representative when John McAveney met with the Union to discuss recognition. Union representative Barrie is one of the Union organizers in charge of the Union's organizing campaign against the Employer. The campaign initially consisted of handbilling the Employer's office and job sites. Beginning in August 2004, the Union held demonstrations in a public parking lot across the street from Kevin's private residence. In response, Kevin installed a security system for his residence. The Employer also retained a guard company to protect Kevin and his family.

This case arose on September 14, 2004 when the Union conducted a demonstration beginning at 6:30 a.m. in the parking lot across from Kevin's residence. The demonstration involved the display of a large inflated rat balloon and 15 to 20 participants who displayed and distributed handbills. The handbills criticized the Employer's labor policy and also criticized Kevin for allegedly making the statement that he didn't care if the Employer's employees "ate cat food when they retired."

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[1] BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

Kevin called the Employer's guard company who sent a guard to his residence.[2]

Kevin asserts that when the Employer's guard escorted him to his car, demonstrators screamed at him and blew their car horns. Kevin also asserts that Barrie neared his car at that time and screamed "fuck you" and called him "cat food Kevin." Although Kevin asserts that he made an audio recording of Barrie's statements, no audio recording was ever produced.[3] Later that evening at around 7:30 p.m., Union demonstrators including representative Barrie held a candle light demonstration in the parking lot across from Kevin's residence. Kevin asserts that demonstrators held a wooden casket and yelled "Come out, Kevin, we're going to put you in a casket sooner or later."

Around one week later, Kevin filed a statement with the local police describing Barrie's alleged cursing and name calling on the morning of September 14th. Kevin's statement was incorporated into a criminal complaint which charged Barrie with harassment and disorderly conduct. The harassment charge alleges that Barrie "with intent to harass, annoy or alarm . . . [engaged in a] course of alarming or distressing conduct in a manner which he [knew was] likely to provoke a violent or disorderly response." The disorderly conduct charge alleges that Barrie "did intentionally create a risk of public alarm . . . by making unreasonable noise and addressing an offensively course-utterance, an offensive gesture or display . . ."

The following day, local police arrested Barrie and served him with these criminal charges. A Justice of the Peace subsequently found probable cause to issue an order for Barrie to appear for arraignment. The Justice also issued a "No Contact" order prohibiting Barrie from coming within 100 yards of Kevin's person, residence, or place of business. Although Kevin did not specifically seek this "No Contact" order, it is a mandatory result of his charges.

Barrie's jury trial was initially scheduled for December 2004 but was rescheduled for April 2005. On that

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[2] Kevin also called the local police who appeared, told the demonstrators to keep the noise down, and then left.

[3] Barrie admits that demonstrators honked their car horns at Kevin. Barrie denies cursing or saying "cat food Kevin." A written incident report filed by the guard makes no mention of cursing or name calling directed at Kevin. A video tape made by the guard does not show the conduct complained of by Kevin.

date, the Judge dismissed the charges on procedural grounds, i.e., because the prosecutor failed to produce for the defendant the alleged audio tape recording of Barrie's statements on September 14th. The Judge thus did not rule on the merits of the case.

ACTION

The Employer's criminal charges are not baseless because they are not plainly foreclosed in law nor baseless in fact. Since there is insufficient evidence that they were filed without regard to their outcome and only to impose the costs of litigation, the Region should dismiss this charge, absent withdrawal.

Kevin's criminal charges were directed at Barrie while he was engaged in a protected Union demonstration. Since the charges appear to be in retaliation against this protected activity, the standards of BE & K and Bill Johnson's Restaurants are implicated.[4] In Bill Johnson's Restaurants, the Court had articulated two standards for evaluating lawsuits, one for ongoing suits and one for concluded suits.[5] For ongoing lawsuits, the Bill Johnson's Court held that the Board may halt the prosecution of the suit if it lacks a reasonable basis in fact or law and was brought for a retaliatory motive. For concluded suits, the Court held that if the litigation resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, the Board could find a violation if the suit was filed with a retaliatory motive.

In BE & K, the Supreme Court rejected the standard for adjudicating ultimately unsuccessful but reasonably based lawsuits.[6] The Court reasoned that this standard was overly broad because the class of lawsuits condemned included a substantial portion of suits that involved genuine petitioning.[7] The Court thus indicated that the Board could no longer rely exclusively on the fact that the lawsuit was

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[4] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 748-49 (1983) ("it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights guaranteed by Section 7 . . .").

[5] Id. at 747-49.

[6] BE & K, 536 U.S. at 527-28, 532.

[7] Id. at 533-34.

ultimately meritless, but must determine whether the lawsuit, regardless of the outcome, was reasonably based.[8]

Because the Supreme Court in BE & K did not articulate the standard for determining whether a completed lawsuit is baseless, the Bill Johnson's standard for evaluating ongoing lawsuits as baseless remains authoritative. The Bill Johnson's Court, in discussing that standard for ongoing lawsuits, stated that the Board's inquiry need not be limited to the bare pleadings, but the Board could not make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.[9] Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."[10] Thus, even after BE & K, a lawsuit is baseless if it presents unsupportable facts or unsupportable inferences from facts and/or if it presents "plainly foreclosed" or "frivolous" legal issues.

The BE & K Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless."[11] The Court viewed the Board as having adopted a standard in reasonably based suits of finding retaliatory motive if the lawsuit itself related to protected conduct that the petitioner believed was unprotected. The Court criticized this standard in non-meritorious, but reasonably based, cases.[12] Similarly, the Court reasoned that inferring a retaliatory motive from evidence of antiunion animus would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal[.]"[13] In dictum, the Court left open the possibility that an unsuccessful but reasonably based lawsuit might be considered an unfair labor practice if it would not have been filed "but for a motive to impose the costs of the litigation process, regardless of

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[8] Id. at 535-37.

[9] 461 U.S. at 744-46.

[10] Id. at 746-47.

[11] BE & K, 536 U.S. at 533.

[12] Id. at 533-34.

[13] Id. at 534 (emphasis in original).

the outcome."[14] We have adopted this standard in analyzing whether completed, reasonably based suits are unlawful.

In Johnson & Hardin Co.,[15] the Board concluded that the above Bill Johnson's standards should be used to evaluate the lawfulness of criminal complaints. The Board stated that filing a criminal complaint with government officials is, like filing a civil lawsuit, "an aspect of the right to petition the Government for redress of grievances."[16] Johnson & Hardin is thus consistent with BE & K where the Court observed that "the right to petition extends to all departments of the Government."[17]

In this case, we conclude that Kevin's criminal charges are not baseless in law or fact.[18] First, the charges of harassment and disorderly conduct are not plainly foreclosed by law; Barrie's alleged misconduct falls within the cited definitions of those violations. The well based nature of these charges is also demonstrated by the fact that the police found reasonable cause to arrest Barrie; the Justice of the Peace found sufficient cause to order Barrie arraigned on these charges, and to issue a "No Contact" order; and the prosecutor pressed both charges to a jury trial, which was dismissed solely on procedural grounds and not on the merits.

The charges are also not factually baseless in view of Kevin's statement to the police. We recognize that Barrie denies the alleged statements; the audio tape of these

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[14] Id. at 536-37.

[15] 305 NLRB 690, 691 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995).

[16] 305 NLRB at 691.

[17] BE & K, 536 U.S. at 525. See also Mr. Z's Food Mart, 325 NLRB 871, 871 n.2, 894 (1998), enf. denied in part 265 F.3d 239 (4th Cir. 2001); Control Services, 315 NLRB 431, 455-56 (1994).

[18] See Mississippi Action for Progress, Inc., Case 26-CA-21015, Advice Memorandum dated May 28, 2003 involving a meeting investigating employee insubordination where a union steward allegedly shouted at the employer representative that she "was going to get her." The employer's criminal complaint against the steward for Disturbing the Public Peace, although dismissed by the court, was found not baseless as not plainly foreclosed by law and involving disputed factual versions of the event.

statements was never produced; and neither the guard's written report nor his video tape recording support Kevin's assertions. However, Bill Johnson's does not permit the Board to make credibility determinations, nor draw inferences from disputed facts.[19]

Finally, there is no evidence that Kevin filed these charges without regard to their outcome, solely to impose the costs of litigation. There is no evidence showing that Kevin did not act "to stop conduct he reasonably believe[d] [was] illegal . . ."[20] Kevin's assertion that he was acting out of genuine fear is buttressed by his prior installation of a residential alarm system and by the Employer's retention of the guard company. Accordingly, the Region should dismiss this charge, absent withdrawal.

B.J.K.

[19] See generally, Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960, 962 (2000), reconsid. Den, 336 NLRB 332 (2001).

[20] BE & K Construction, 536 U.S. at 534.